No. 09-56999

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEDELITO TRINIDAD Y GARCIA,

Petitioner/Appellee,

v.

MICHAEL BENOV, Warden,
Metropolitan Detention Center - Los Angeles,

Respondent/Appellant.

On Appeal From the United States District Court
For the Central District of California

PETITION FOR REHEARING AND REHEARING *EN BANC*

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PETITION FOR REHEARING AND REHEARING *EN BANC*

INTRODUCTION

This Court decided in an earlier case to resolve *en banc* the issue posed here in this appeal: whether or not a court may inquire into the Secretary of State's decision to extradite a fugitive who claims he will face torture. That prior case became moot before this Court could rule. See *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004) (*en banc*). The same issue is back before this Court and the need for *en banc* resolution is even clearer because this Court is now in direct conflict with one of its

sister Circuits (see *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007)), and Congress has passed new legislation that contradicts this Court's prior precedent. Moreover, the rationale underlying this Court's precedent is at complete odds with the Supreme Court's reasoning in *Munaf v. Geren*, 553 U.S. 674 (2008), where that Court unanimously ruled that a U.S. citizen detainee's claim that he could not properly be surrendered to Iraqi authorities for trial because he would be tortured in Iraqi custody was ***not*** justiciable in light of the U.S. Government's policy that it will not transfer an individual where torture is likely to result.

In the case at bar, a panel of this Court has reluctantly ruled that the Court's precedent provides for judicial review of a determination by the Secretary of State to extradite a fugitive from justice to one of our treaty partners, after the Department of State has considered and rejected the fugitive's claim that he is likely to be tortured. In this instance, the United States has been trying for more than six years to comply with a request from the Republic of the Philippines to extradite petitioner Hedelito Trinidad y Garcia to stand trial in that country on a kidnap-for-ransom charge.

Our argument is a limited one. In particular, the Government is not arguing that the Secretary of State has the discretion to surrender a fugitive who likely will be tortured, even if foreign policy interests at the time would be served. The United States has already stated that it will not transfer a detainee if torture is more likely than not to occur in the receiving state. See Reply Brief for the Federal Parties, at 23, in *Munaf v. Geren*, Nos. 07-394 & 06-1666 (Sup.Ct.); *cf. Munaf*, 553 U.S. at 702 (noting that "this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway").

Rather, our position is that where appropriate procedures are in place, and the Secretary has followed those procedures in making a considered determination that a fugitive is not likely to be tortured, a court may not inquire into that decision, one which often depends on complex, delicate, and confidential judgments concerning conditions in foreign countries and multiple foreign relations considerations.

We emphasize that the State Department has just such an established and extensive procedure in place to address allegations of

torture; pursuant to State Department regulations and established practice, multiple Department policy and legal offices gather all relevant information so that the torture claim can be fully investigated and considered. Only when that comprehensive process is complete will the Secretary decide whether to issue a surrender warrant, which will in appropriate circumstances be issued only after receiving specific assurances of appropriate treatment by the receiving foreign state, subject to monitoring.

The ruling by the panel in this case that this Court's precedent provides that such determinations are justiciable significantly undermines the ability of the United States to carry out its treaty obligations to extradite fugitives in a timely manner. This result can cause serious friction in our relations with friendly nations, particularly if the relevant statute of limitations runs as the fugitive engages in lengthy litigation battles. This in turn threatens the cooperative relationships essential to the United States' ability to obtain assistance from foreign states in returning fugitives to this country so that they can be tried in the courts here. This Court's precedent thus undermines the United States' ability

to obtain the return of fugitives, including terrorists and other criminals whose conduct threatens U.S. national security. Indisputably, a properly functioning extradition process is essential for foreign relations, national security, and effective domestic law enforcement.

For these reasons, the Court should grant panel rehearing or rehearing *en banc* under FRAP 35 and 40.

STATEMENT

1. An understanding of the backdrop against which this case arises is important.

Extradition is a treaty- and statute-based action by which a fugitive is returned to a foreign country to face criminal charges. The process is initiated by a request from a foreign country to the State Department, which, along with the Justice Department, evaluates whether the request is within the scope of the applicable extradition treaty.

A district judge or magistrate judge then determines whether the crime is extraditable, and whether there is probable cause to sustain the charge. 18 U.S.C. 3184. "If the evidence is sufficient to sustain the charge, the inquiring [judicial officer] is required to certify the individual

as extraditable to the Secretary of State and to issue a warrant." *Prasoprat v. Benov*, 421 F.3d 1009, 1012 (9th Cir. 2005).

A judicial extradition certification is subject to limited collateral review through habeas, confined to whether the extradition judge had jurisdiction to conduct the proceeding and jurisdiction over the individual, whether the extradition treaty was in force and covered the crime at issue, and whether there was probable cause that the individual committed the crime. *Id.* at 1013.

Once a judge has certified extraditability, the question of whether the fugitive will be surrendered to the requesting foreign state is committed to the discretion of the Secretary of State. See 18 U.S.C. 3186 ("[t]he Secretary of State *may* order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which he is charged") (emphasis added).

Consequently, "extradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function." *Vo v. Benov*, 447 F.3d 1235, 1237

(9th Cir. 2006). Under a principle known as the "Rule of Non-Inquiry," the Secretary's decision whether to extradite a fugitive certified as extraditable has therefore traditionally been treated as final and "not subject to judicial review." *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997)).

2. Critical to this case and U.S. policy is the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), a non-self executing treaty. See U.S. Dep't of State, *Treaties in Force*, 458 (2009).

Article 3 of the CAT provides that state parties will not extradite a fugitive "where there are substantial grounds for believing that he would be in danger of being subjected to torture. * * * For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." S. Treaty Doc. No. 100-20, at 20 (1988).

To implement the CAT, Congress passed the FARR Act (Pub. L. No. 105-277, Sec. 2242, codified at 8 U.S.C. § 1231 note), which is at the heart of this case and expressly states that it does not create jurisdiction for a court to review the Secretary of State's application of Article 3 of the CAT: "[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal [in immigration cases under the Immigration and Nationality Act]." FARR Act, Section 2242(d).

Pursuant to Article 3 of the CAT and the FARR Act, the United States has however undertaken not to extradite a person if it is more likely than not that he will be tortured. ER 10. To carry out this policy, the State Department adopted regulations (22 C.F.R. 95.1 through 95.4) providing that in extradition cases involving allegations of torture "appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant." *Id*. § 95.3(a). Thereafter,

"[b]ased on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." *Id*. § 95.3(b).

The State Department's decision-making process in extradition cases often raises sensitive issues when a fugitive makes torture claims. The Department may need to decide whether to broach with foreign officials delicate questions of possible mistreatment. See ER 16. The Department may further need to determine whether to seek assurances from the requesting country, and concomitantly evaluate whether such assurances are likely to be reliable and credible. See ER 12-13. Those determinations can require expertise, including an understanding of the nature and structure of the requesting country's government and its degree of control over the various actors within its judicial system, an ability to predict how the country is likely to act in light of its past assurances and behavior, and an evaluation of how best to protect the safety of the fugitive. ER 13-15.

In a number of cases, the Secretary signed an extradition warrant only after the Department engaged in diplomatic dialogue and received

adequate assurances of humane treatment; in some instances, the Department has monitored or arranged for a third-party, such as a governmental or non-governmental human rights group, to monitor the condition of the fugitive after extradition. ER 13-14.

The State Department's ability to obtain assurances from a requesting nation depends in part on the ability to treat these dealings with discretion. ER 16. Experience by State Department officials has demonstrated that the delicate diplomatic exchange often required in these contexts cannot occur effectively except in a confidential setting; review in a public forum of the Department's dealings with a requesting country would seriously undermine the Department's ability to investigate torture allegations and reach acceptable accommodations. ER 17.

In addition, judicial decisions overturning a determination made by the Secretary after extensive discussions and negotiations with a requesting state could seriously undermine our foreign relations and add delays to what is already a lengthy process. ER 17. This delay could threaten the requesting country's ability to prosecute, and harm efforts by

the United States to press other countries to act more expeditiously to surrender fugitives for trial here. ER 17-18.

3. In September 2007, a United States magistrate judge certified the request by the Philippines for extradition of petitioner Trinidad, based on a charge that he had participated in a kidnap-for-ransom scheme. As he is entitled to do, Trinidad challenged that certification by filing a habeas petition pursuant to 28 U.S.C. 2241. Trinidad claimed that his extradition was improper because he would be tortured if returned to the Philippines, and because there was no probable cause to believe that he had been involved in the alleged kidnaping. The district court denied Trinidad's petition without prejudice to the filing of a new petition concerning his torture allegations should the Secretary of State subsequently decide to surrender him. ER 23-24.

After the State Department considered Trinidad's torture claims, the Secretary determined in September 2008 that Trinidad should be surrendered to the Philippines. Trinidad then filed this second habeas petition, challenging the Secretary's surrender decision on the ground that the Secretary's decision was arbitrary and capricious in violation of the

Administrative Procedure Act and substantive due process principles because there are assertedly "substantial grounds" to believe Trinidad will be tortured upon his surrender. ER 2-3.

The district court rejected the Government's argument that a court may not inquire into the Secretary's determination , and directed the State Department to produce evidence to support her decision, which could include records disclosing dealings between State Department officials and the Philippine government regarding Trinidad's torture claims. ER 68-69. The Government declined to produce this material, and the district court therefore granted Trinidad's petition and ordered him released. ER 77-94.

4. The district court based its justiciability ruling here on this Court's rulings in the extradition litigation involving Ramiro Cornejo Barreto. *Cornejo* involved a request by the Mexican government for Cornejo's extradition from the United States on murder charges. After the district court found in favor of extraditability, Cornejo had filed a habeas action, arguing that he could not validly be extradited to Mexico because he would be tortured there.

In its first ruling in the case, a panel of this Court dismissed Cornejo's habeas petition as unripe because the Secretary had not yet made a determination to proceed with extradition. *Cornejo-Barreto v. Siefert*, 218 F.3d 1004 (9th Cir. 2000) ("*Cornejo I*"). However, two judges on the panel (B. Fletcher and Thompson, JJ.) went on to state that, if the Secretary in the future decided to extradite him, Cornejo could, under the Administrative Procedure Act, file a second habeas action challenging the validity of the Secretary's decision measured against U.S. law and policy providing that a fugitive will not be extradited if it is more likely than not that he will be tortured.

Judge Kozinski concurred in the dismissal, but did not join the panel's discussion of hypothetical later jurisdiction; he would have held instead "that the district court does not have jurisdiction to review petitioner's claim under the Torture Convention, because [the domestic statute implementing that treaty] does not authorize judicial enforcement of the Convention." *Id*. at 1017.

The Secretary decided to extradite Cornejo, which led to a second decision by this Court. *Cornejo-Barreto v. Seifert*, 379 F.3d 1075 (9th Cir.

2004) ("*Cornejo II*"). The second panel held that the statements in *Cornejo I* concerning hypothetical jurisdiction had been dicta, and under the Rule of Non-Inquiry a court could not inquire into the Secretary's decision to extradite after her consideration of a torture claim.

This Court granted *en banc* rehearing, but before the case could be so heard, the Mexican government announced that its statute of limitations had run while the litigation had wended its way through the courts, and Cornejo could no longer be prosecuted in Mexico. Accordingly, this Court dismissed the matter as moot and vacated the second *Cornejo* opinion. *See Cornejo-Barreto v. Seifert*, 389 F.3d 1307 (9th Cir. 2004) (*en banc*).

5. Following the district court's order here applying *Cornejo I* and releasing Trinidad, the United States appealed to this Court. The Government argued that the statements in *Cornejo I* involving hypothetical later jurisdiction were dicta and not binding. In addition, we pointed out that, after *Cornejo I*, Congress had enacted 8 U.S.C. 1252(a)(4) as part of the REAL ID Act. This statute provides that, notwithstanding ***any*** other law (including habeas law), the sole and exclusive means for

judicial review of a CAT claim is through a petition for review of a removal order filed in a court of appeals in an immigration case. In other words, the plain statutory text says that courts have no jurisdiction to consider CAT claims except in the context of review of an immigration removal order in a court of appeals.

In addition, the Government relied on the Supreme Court's recent decision in *Munaf v. Geren*, 553 U.S. 674 (2008), to contend that Trinidad's claim must be dismissed. There, the Supreme Court denied habeas petitions based on torture claims by two U.S. citizens seeking to prevent their planned transfer from U.S. forces to the Iraqi government in order to stand trial in Iraqi courts. The Supreme Court instructed that the courts should not second-guess Executive Branch decisions to surrender detainees to foreign states, because such judicial action would usurp the proper role of the political branches: "[t]he Judiciary is not suited to second-guess * * * determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 702. The Court stressed that, "[i]n contrast, the political branches are well situated to consider

sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Ibid.*; *accord id.* at 700-01 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments").

6. The panel nonetheless held that *Cornejo I* is still binding precedent, and it upheld the district court's ruling.

In discussing the legal issues, the panel described (slip op. 5) the jurisdictional statements in *Cornejo I*, and then recognized the "well reasoned opinion by another panel" in *Cornejo II* (the decision that had ruled that a court may not inquire into the Secretary's surrender decisions, but was subsequently vacated). The panel also held (slip op. 6) that *Cornejo I* had not been overridden by the Supreme Court's decision in *Munaf*, which had declined to address jurisdiction over a FARR Act claim.

With regard to the Government's REAL ID Act argument and Trinidad's response, the panel stated that "[i]f we were writing on a clean

slate, we would hold that the Government has the better of the argument" (slip op. 7). However, the panel believed that Circuit precedent in *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006), determined that the REAL ID Act does not apply to federal habeas corpus petitions that do not involve final orders of immigration removal.

The panel therefore affirmed the judgment of the district court in Trinidad's favor.

REASONS FOR GRANTING REHEARING

Rehearing or rehearing *en banc* is warranted here for several reasons.

1. As already noted, this Court granted rehearing *en banc* in the *Cornejo* litigation in order to resolve the very issue that is now back before the Court: whether a court may inquire into the Secretary's decision to surrender a fugitive after the State Department has rejected his torture claim. Two different panels of this Court had split on that issue, and the Court was therefore poised to set the binding law of the Circuit. However, because the extradition proceedings in *Cornejo* had lasted so long, the applicable Mexican statute of limitations expired and the matter became

moot. This case presents a perfect opportunity for this Court to finish the *en banc* proceeding that was interrupted in *Cornejo*.

2. The Government argued before the panel here that, even if *Cornejo I* represented the law of the Circuit, the hypothetical justiciability determination in that opinion had been overridden by Congress in 2005, in Section 1252(a)(4) of the REAL ID Act, the plain text of which states that, notwithstanding any other law (including habeas law), the sole avenue for review of CAT claims is through review in a court of appeals of a final order of immigration removal. While Trinidad argued against that reading of the REAL ID Act, the panel stated that the Government had the better of the argument, but was bound by this Court's prior decision in *Nadarajah* that the REAL ID Act bars review of such claims only in the context of immigration removal cases.

Nadarajah, however, dealt with a different part of the REAL ID Act than applies here. This Court ruled that release should be ordered for an alien who had been tortured abroad, fled to the United States, was detained here, and sought asylum against immigration removal. The Court pointed out that, although neither party had raised any

jurisdictional issue, it had a *sua sponte* obligation to examine the point. The Court then held (443 F.3d at 1075-76) that the relevant habeas-stripping provision in the REAL ID Act (8 U.S.C. 1252(b)(9)) applied only to a habeas petition involving a final order of immigration removal, which was not at stake in the case before it. Accordingly, the Court concluded, habeas jurisdiction in other contexts remained available (443 F.3d at 1076).

The Government's non-reviewability argument in the case at bar is based on 8 U.S.C. 1252(a)(4), which is entitled "Claims under the United Nations Convention." As discussed already, the text of that provision states that, notwithstanding any other provision of law, including the habeas statute, the "sole and exclusive means for judicial review of any cause or claim under the [CAT]" is through an action in a court of appeals seeking review of a final order of immigration removal. By contrast, the *Nadarajah* panel considered only 8 U.S.C. 1252(b)(9), which is entitled "Consolidation of questions for judicial review," and by its terms covers judicial review of final orders of immigration removal.

The case at bar involves extradition, not a claim for asylum against immigration removal. This Court's *sua sponte* analysis of the REAL ID Act in *Nadarajah* involved a distinct part of that statute, covering review of immigration removal orders, and did not address the different language of Section 1252(a)(4), which limits review of CAT claims, notwithstanding any other law.

Accordingly, the panel erred here in believing that it was bound by *Nadarajah*. The panel should have instead accepted our argument – which the panel deemed the "better" one – and ruled that *Cornejo I* did not survive Congress' enactment of the REAL ID Act.

3. Moreover, the reasoning in *Cornejo I* is directly inconsistent with the rationale applied by the Supreme Court in *Munaf*, to the effect that determinations about whether an individual is likely to be tortured after transfer to a foreign government lie exclusively within the realm of the Executive Branch. The Supreme Court ruled that such determinations are non-justiciable because they are beyond the proper competence of the courts. While the panel here recognized (slip op. 6) that *Munaf* did not involve a claim under the FARR Act, the Supreme Court's reasoning

nevertheless makes clear that decisions about expected treatment in a foreign country are not appropriate for the Judicial Branch.

In addition, most recently, the D.C. Circuit in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010), relied heavily on *Munaf* and the language of the REAL ID Act in holding that a detainee at Guantanamo could not ask a district court to enjoin his transfer to a third country based on a claim that he would be tortured in the receiving country. The D.C. Circuit recognized United States policy against transfer when torture is more likely than not to occur, and concluded that, under *Munaf*, "the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee." 561 F.3d at 514.

4. The panel's decision here also reflects a direct conflict in the Circuits. Like *Cornejo I*, the Fourth Circuit ruled in 2007 in *Mironescu*, 480 F.3d at 668-73, that the Rule of Non-Inquiry does not bar habeas review of the Secretary's extradition decisions. However, the Fourth Circuit went on to hold that Section 2242(d) of the FARR Act "flatly prohibits" courts from considering CAT and FARR Act claims on habeas

review. *Mironescu*, 480 F.3d at 673-77. The court closely analyzed the text of Section 2242(d), and found that it does not permit habeas review of a CAT claim in the extradition context. The Fourth Circuit also noted that this reasoning applies as well to attempts to seek review under the Administrative Procedure Act. *Mironescu*, 480 F.3d at 677 n.15.

5. These factors compel the conclusion that rehearing or rehearing *en banc* is warranted because judicial review of extradition determinations by the Secretary causes serious problems by imposing substantial delays on the process of transferring fugitives to stand trial in foreign states and impeding the ability of the United States to fulfill its international treaty obligations. As explained above, the extradition process in *Cornejo* lasted so long that the Mexican statute of limitations had run before the *en banc* proceedings could be completed. And in *Mironescu*, the extradition was so delayed that it became moot as Mironescu was in detention in the United States for the entirety of the time he could have been imprisoned in Romania, which had been seeking his extradition. See *Mironescu v. Costner*, 552 U.S. 1135 (2008) (certiorari petition dismissed as moot).

More recently, in *Prasoprat*, despite the existence of a CAT claim, the

Government was able to complete an extradition to Thailand only because in Prasoprat's second habeas petition, the district court ruled that he had not made a sufficient showing of likely torture, and this Court denied a request to enjoin the surrender pending appeal. See *Prasoprat v. Benov*, No. 09-56067 (9th Cir. March 10, 2010) (order denying stay of extradition). Even in that circumstance, the extradition took approximately nine years to effectuate.

CONCLUSION

For the foregoing reasons, rehearing or rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing petition is proportionally spaced, has a serif type face (Century Schoolbook) of 14 points, in Wordperfect X4, and contains 4,199 words, according to the word processing system used to prepare this brief. I understand that a material misrepresentation can result in the Court striking the petition or imposing sanctions.

October 7, 2010

/s/Douglas Letter
Douglas Letter
Counsel for Appellant

STATEMENT OF RELATED CASES

We are aware of no related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing Petition for Rehearing or Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 7, 2010.

All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Douglas Letter
DOUGLAS LETTER
Attorney for Appellant

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HEDELITO TRINIDAD Y GARCIA, Petitioner - Appellee, v. MICHAEL BENOV, Warden, Metropolitan Detention Center - Los Angeles, Respondent - Appellant.	No. 09-56999 D.C. No. 08-CV-7719-MMM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted July 13, 2010
Pasadena, California

Before: FARRIS and SILVERMAN, Circuit Judges, and CAMP, Senior District Judge.**

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Jack J. Camp, Senior United States District Judge for the Northern District of Georgia, sitting by designation.

The Government appeals the district court's order granting a petition for a writ of habeas corpus and ordering the release of Hedelito Trinidad y Garcia ("Trinidad"). At issue on appeal is whether federal courts have jurisdiction to review a decision by the Secretary of State that an extraditee will not be subjected to torture if returned to the requesting State.

I. Background

In 2003, the Republic of the Philippines requested that the United States extradite Trinidad in order to stand trial on a kidnaping for ransom charge. After a magistrate judge certified to the Secretary that Trinidad was extraditable under 18 U.S.C. § 3184, the Secretary conducted an internal review to examine Trinidad's claims that he would be subjected to torture in the Phillippines if returned. The Secretary rejected Trinidad's claims, decided to surrender Trinidad to Philippine officials, and signed his surrender warrant.

Trinidad then filed a petition for a writ of habeas corpus challenging the Secretary's decision to surrender him as arbitrary in violation of the Administrative Procedure Act ("APA") because it ignored evidence that he was likely to be tortured if returned to the Philippines. The Government moved to dismiss Trinidad's habeas petition on the ground that, pursuant to the Rule of Non-Inquiry,

the decision by the Secretary to surrender Trinidad is not subject to judicial review.[1] The district court denied the Government's motion, holding that it had jurisdiction to review the habeas petition.

The administrative record, however, did not contain sufficient evidence for the district court to determine whether the Secretary's decision was arbitrary. Accordingly, the district court ordered the Government to produce evidence from the administrative record underlying the Secretary's decision to surrender Trinidad. Maintaining that the district court lacked jurisdiction to review the Secretary's decision, the Government refused to turn over the relevant portions of the administrative record. Having no administrative record to review, and, thus, no basis on which to conclude that the Secretary's decision complied with the APA, the district court granted Trinidad a writ of habeas corpus and ordered his release. The Government appeals the district court's order granting Trinidad a writ of habeas corpus.

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[1] The Rule of Non-Inquiry provides that "it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state." Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1084 (9th Cir. 2004) ("Cornejo II"), *vacated by* Cornejo-Barret v. Siefert, 389 F.3d 1307 (9th Cir. 2004).

II. Jurisdiction and Standard of Review

We have jurisdiction to review a district court order granting a habeas petition pursuant to 28 U.S.C. § 2253. Whether judicial review of the Secretary's decision to surrender an extraditee is permitted is a question of law, which the Court reviews *de novo*. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984). Similarly, we review *de novo* the district court's grant of a habeas corpus petition. Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1009 (9th Cir. 2000) ("Cornejo I").

III. Discussion

A. The Cornejo Opinions

In Cornejo I, this Court found that federal courts have jurisdiction to review the Secretary's decision to surrender an individual who alleges, pursuant to the Foreign Affairs Reform and Restructuring Act of 1998 ("FARR Act"), that he is likely to be tortured if turned over to the requesting State. Id. at 1015. The Court explained that "[a]n extraditee ordered extradited by the Secretary of State who fears torture upon surrender . . . may state a claim cognizable under the APA that the Secretary of State has breached her duty, imposed by the FARR Act, to implement Article 3 of the Torture Convention." Cornejo I, 218 F.3d at 1016-17. Pursuant to the APA, a district court must set aside the Secretary's decision if it is

found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. at 1015 (quoting 5 U.S.C. § 706(2)(A)).

A subsequent, well reasoned opinion by another panel of this Court found the discussion of judicial review in Cornejo I was dicta and not binding on the panel. Cornejo II, 379 F.3d at 1082. The panel then held that the Secretary's determination to surrender an individual is not subject to judicial review because such a decision is a matter of foreign policy that should be left to the Executive Branch. Id. at 1088-89.

The Cornejo case, however, was not finished because the Court ordered an *en banc* review. But before the Court could decide the case *en banc*, Mexico withdrew its extradition request. Accordingly, the Court granted the Government's motion to dismiss the appeal as moot. Cornejo-Barret v. Siefert, 389 F.3d 1307 (9th Cir. 2004) ("Cornejo III"). The Court then vacated Cornejo II without explanation and denied the Government's request to vacate Cornejo I, also without explanation. Id. Cornejo I, thus, remains binding precedent in this Circuit.

B. The Supreme Court's Decision in Munaf v. Geren

The Government contends that the Supreme Court's recent decision in Munaf v. Geren, 553 U.S. 674, 128 S. Ct. 2207 (2008), cannot be reconciled with Cornejo I and implicitly overrules its holding that federal courts have jurisdiction

to review the Secretary's determination that an extraditee is not likely to be tortured. In Munaf, the Supreme Court explained that the decision of the Executive Branch to surrender a detainee, including the decision of the Secretary that a detainee is not likely to be tortured, is a matter that should be addressed by the Executive Branch rather than the Judicial Branch. 553 U.S. at ____, 128 S. Ct. at 2226. The Munaf Court, however, specifically declined to address whether the Court would have jurisdiction to review a habeas petition raising a FARR Act claim. Id. Therefore, Carnejo I, which involved a habeas petition raising a FARR Act claim, remains good law.

C. The REAL ID Act

The Government also contends that recent congressional legislation addressing immigration issues, REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., 119 Stat. 231, 311 (2005), supercedes Cornejo I and deprived the district court of jurisdiction over this habeas petition. The relevant portion of the REAL ID Act provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms

> of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

8 U.S.C. § 1252(a)(4). The Government notes that the United States Court of Appeals for the District of Columbia recently interpreted Section 1252(a)(4) to limit judicial review under the FARR Act to challenges to a final order of removal. Kiyemba v. Obama, 561 F.3d 509, 514-515 (D.C. Cir. 2009).

If we were writing on a clean a slate, we would hold that the Government has the better of the argument. However, binding precedent in this Circuit contradicts the Government's interpretation of the REAL ID Act's jurisdiction stripping provision. In Nadarajah v. Gonzales, this Court held that:

> By its terms, [8 U.S.C. § 1252(a)(4)] does not apply to federal habeas corpus petitions that do not involve final orders of removal. Here. . . there is no final order of removal. . . . Therefore, in cases that do not involve a final order of removal, federal habeas corpus jurisdiction remains in the district court, and on appeal to this Court, pursuant to 28 U.S.C. § 2241.

443 F.3d 1069, 1075-76 (9th Cir. 2006). Thus, the jurisdiction-stripping provision of the REAL ID act only applies to habeas corpus petitions that involve final orders of removal. Id. at 1075. Here, the habeas petition does not involve a final order of removal, and district court had jurisdiction to review the Secretary's decision to extradite Trinidad.

IV. Conclusion

Having jurisdiction to review the Secretary's decision, the district court properly ordered the Government to produce evidence from the administrative record so that it could determine whether the Secretary complied with the requirements of the APA. Because the Government failed to comply with the district court's order, the district court had no record from which to conclude that the Secretary's decision was supported by substantial evidence, and, therefore, it was forced to find that the decision was arbitrary and capricious in violation of the APA. The district court, therefore, did not err by granting the habeas petition.

AFFIRMED